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April 19, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 8, 2004

Case No.: TIA-0187

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

*I. Background*

**A. The Relevant Statute and Regulations**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a computer programmer/analyst at the Rocky Flats Plant (the plant). He worked at the plant from 1980 to 1981.

The Applicant filed a Subpart B application with the DOL and a Subpart D application with OWA. In those applications, the Applicant claimed that his colon cancer was related to exposures to toxic substances during his DOE employment.

The DOL denied the Subpart B application, based on a National Institute of Occupational Safety and Health (NIOSH) radiation dose reconstruction. The NIOSH dose reconstruction showed that the likelihood that the Applicant's colon cancer was related to radiation exposure at DOE was less than 50 percent. See OWA Report at 193.

The OWA denied the Subpart D application. The Physician Panel found that there was insufficient evidence linking the Applicant's workplace exposures to his colon cancer. The Panel noted the Applicant's display of colon problems prior to his

DOE employment and his familial history of colon cancer. See OWA Record at 38. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. The Applicant states that he was exposed to radiation during his employment. The Applicant states that the Panel could not rule out radiation exposure at the plant as the cause of his colon cancer. See Applicant's Appeal Letter.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing" the illness. 10 C.F.R. § 852.8.

The Applicant has not demonstrated panel error. Although the Applicant disagrees with the Panel's negative finding with respect to radiation exposure, the Applicant's disagreement is based on a misunderstanding of the applicable standard. The Panel was not required to "rule out" radiation as a factor in the Applicant's colon cancer. Instead, the Panel was required to consider whether it was at least as likely as not that radiation exposure was "a significant factor in aggravating, contributing to, or causing" the cancer. 10 C.F.R. § 852.8. The Panel applied this standard. Accordingly, the Applicant's statement that the Panel could not "rule out" radiation as a factor does not demonstrate Panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0187, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 19, 2005